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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1533

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Petitioner,

against

ERNEST WELCOME,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

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ERNEST WELCOME,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Leon J. Vincent, Superintendent of Green Haven Correctional Facility, Stormville, New York, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated February 2, 1977, which reversed a judgment of the United States District Court for the Southern District of New York (WEINFELD, D.J.) dated September 2, 1976 and remanded the matter to the District Court with instructions to issue the writ of habeas corpus unless respondent is granted a new trial within a reasonable period to be fixed by the district court.

Opinions Below

The opinion of the Court of Appeals is reported at 549 F 2d 853 and is reproduced at Appendix "A" (1a-13a). The

opinion of the District Court is reported at 418 F Sup. 1088 and is reproduced as Appendix "B" (14a-25a).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on February 2, 1977.

Question Presented

1. Was the respondent deprived of his due process right to a fair trial when the trial court refused to permit his counsel to question a witness who respondent had called to testify regarding that witness' confession to the same crimes for which respondent and his two co-defendants were on trial?

2. Did the Second Circuit exeeed its authority as appellate court when after reviewing the trial minutes, it questioned the credibility of certain witnesses for the prosecution?

3. Does a conflict exist between the Fifth Circuit and the Second Circuit in their interpretations of this Court's decision in *Chambers* v. *Mississippi,* which should be resolved by this Court because of its fundamental importance to the criminal justice system of the states?

State Statute Involved

New York Code of Criminal Procedure

§ 8-a "In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party

has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath."*

Statement of the Case

A. Introduction

Petitioner is presently confined pursuant to a judgment of conviction for the crime of murder rendered on March 10, 1970 by the Supreme Court of the State of New York, Bronx County, after trial by jury. Petitioner was convicted on four counts of the indictment involving the death of two individuals and was sentenced to concurrent terms of imprisonment of twenty-five years to life.

B. The Crime

The respondent Ernest Welcome, along with co-defendants Winston Holmes and Charles Gale, was indicted for the murders of Hyman and Seymour Katz. The indictment charged the respondent with common-law murder and felony murder "while engaged in the commission of the crime of robbery".

On November 2, 1967 at approximately 3:45 p.m., three men entered the Katz Brothers Real Estate Office at 308 E. 149th Street in the Bronx. They inquired about a listing describing an apartment. Within minutes shots were fired and both Seymour and his brother Hyman Katz were dead. Several employees of the Katz brothers were present and had ample opportunity to observe the gunmen. During the course of the investigation these men were identified through lineups and photo-identifications as the respondent and his two codefendants.

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* Section 8-a has been superseded by § 60.35 of the New York Criminal Procedure Law.

C. The Trial

Two witnesses identified the respondent at trial. The first witness, Janet Laccorn, was an employee of the Katz brothers. On November 2, 1967 she went to the reception window in the office in response to a buzzer. She saw a black male wearing a hat and glasses. Hyman Katz joined Ms. Laccorn and told her he would handle the matter. She returned to her desk.

A second buzzer rang and as Ms. Laccorn looked through the reception window she saw a man leaning against the door and a third man whose face she could not observe. At trial, she positively identified the man leaning against the door as Ernest Welcome. He was wearing a greyish herringbone or tweed coat. Again, Hyman Katz told her he would take care of the matter and she returned to her desk.

A short time later, Hyman Katz was heard yelling to his brother Seymour for help. Ms. Laccorn observed defendant Gale on the way into the office proper. He had a gun in his hand and was wearing a dark hat, dark jacket and glasses with dark rims. She observed Gale and Hyman Katz struggle. Next, before hiding under a desk, she saw a second man with a gun enter the office proper. While under the desk she heard four or five shots and screaming. After coming out from under the desk, she saw Seymour Katz bleeding as he lay on the floor and Hyman Katz staggering off to another office.

Ms. Laccorn had identified both Gale and Welcome in separate lineups. The lineup with respondent was conducted in November or December, 1967. At a pre-trial identification hearing, the Court determined that the lineup at which Ms. Laccorn identified respondent was conducted fairly and in no way tainted the in-court identification. She had testified that she observed respondent for approximately thirty seconds and described him as a black male of average height wearing a herringbone or checkered coat.

Four other employees who were present testified at trial. Of these four, two identified defendant Holmes and three identified defendant Gale. Both these defendants were observed carrying guns.

The second witness to identify the respondent, Delores Marcell, was employed by a firm located on the floor below the Katz Brothers' office. Ms. Marcell heard screaming coming from the Katz Brothers' office. She left her office and walked into three men. One of these men she identified as the respondent. She recalled that he was wearing a dark coat and hat. Ms. Marcell had identified respondent in a lineup held on December 12, 1967. At the pre-trial hearing, Ms. Marcell's identification was determined to be based on observations of the respondent other than those at the lineup so that an in-court identification would be admissible.

The last witness against the respondent was Vincent Turner who stated that he knew the respondent and that on November 19, or 20, 1967 he saw Ernest Welcome in a pool room on Eighth Avenue and 131st Street. Welcome told Turner about "that thing in the Bronx", "them two studs I burnt". Turner asked respondent if he was referring to the "real estate thing" and respondent said "yeah". Turner also told the jury that he was awaiting sentence on five armed robbery charges.*

Respondent Welcome presented three alibi witnesses. He also called one Albert Cunningham, a man initially indicted for the Katz brothers murders. This indictment had subsequently been dismissed.

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* Respondent Welcome had argued to the District Court and the Court of Appeals that he was entitled to the writ of habeas corpus because Turner had subsequently recanted his trial testimony. It was conceded, however, that if Turner did commit perjury, the prosecution did not have knowledge that the testimony was perjured. Rather, this perjury was supposedly at the urging of one of respondent's codefendants. The District Court dismissed this argument and the Court of Appeals did not find it necessary to reach it.

Cunningham was apparently called as a defense witness with the hope of eliciting from him the fact that he had confessed to the crimes. On direct examination, Cunningham stated that he had been indicted and charged with the Katz murders and that he had had conversations with detectives and an assistant district attorney.* Respondent's counsel attempted to ask Cunningham what he had told these people but the assistant district attorney objected and the trial court sustained the objection. The Court instructed counsel to inquire only as to the witness' status as a participant or eyewitness to the crime. The judge went on to say that if it appeared that Cunningham was a hostile witness, that is, implicated Welcome or his codefendants, then cross-examination of Cunningham would be permitted as to prior inconsistent statements to the assistant district attorney or others even though these statements were not in writing.

Direct testimony of Cunningham continued and the witness stated that he drove to the Bronx with Branch and Green and that they were armed. He testified that they robbed the real estate office but that he did not know if a shooting occurred.

On cross-examination by the assistant district attorney, Cunningham retracted this testimony. He volunteered, not in response to the district attorney's questions, that he thought Welcome's counsel's questions referred to his confession. Cunningham then denied any participation in the robbery or knowing anything about the crimes.

On redirect, defense counsel argued that the statement concerning the "confession" opened the door, and he again

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* Cunningham's statement to the assistant district attorney had been reduced to writing but was neither signed nor sworn to. The essence of the statement is that in November 1967, Cunningham, one "Branch", Thomas Green, and another were armed and drove to a business building in the Bronx. Cunningham waited outside while the others went upstairs. Cunningham heard a shot and ran away.

sought to question Cunningham concerning the prior statements to show that they were inconsistent with answers given on cross-examination. The trial court would not permit this since Cunningham's testimony had not inculpated the respondent and the oral statements concerned were inadmissible hearsay.

Cunningham had been indicted and brought to trial for the Katz brothers' murders before respondent's trial. Prior to Cunningham's first trial, which ended in a mistrial, a Huntley hearing concerning the voluntariness of his statements was held. (*People* v. *Huntley,* 15 N Y 2d 72, 255 NYS 2d 838 [1965]). The statements were ruled to be admissible. During the course of Cunningham's testimony at respondent's trial, the Bronx District Attorney appeared in court to explain why the indictment against Cunningham had been subsequently dismissed. Police investigation revealed that Branch and Green, the two participants in the murder named by Cunningham in his statement, could not have participated in the crime since one was out of state and the other was in jail at the time. Cunningham also was given a polygraph test which indicated his innocence. It also appeared that Cunningham was a narcotics addict undergoing withdrawal at the time and would have admitted to anything. These were compelling reasons for dismissing the indictment against Cunningham.

D. Prior State Proceedings

Respondents conviction was affirmed without opinion by the Appellate Division, First Department. 39 A. D. 2d 841, 331 N.Y.S. 2d 995 (1972). Leave to appeal to the New York Court of Appeals had been denied by one judge of that Court but subsequently granted by another judge.

Respondent had also filed a motion for a new trial pursuant to the N.Y. Crim. Proc. Law § 440.10 on the basis of witness Turner's recantation. This motion was denied by

the Supreme Court and the denial affirmed by the Appellate Division, First Department, with one justice dissenting. 46 A. D. 2d 860, 361 N.Y.S. 2d 378 (1974). Respondent appealed to the Court of Appeals.

The Court of Appeals consolidated both appeals, dismissed the direct appeal and affirmed the denial of the motion for new trial. 37 N Y 2d 811, 375 N.Y.S. 2d 573 (1975).

E. Federal Proceedings

Petitioner's habeas corpus application to the United States District Court for the Southern District of New York was denied on September 2, 1976. Respondent had argued that he was denied his due process right to a fair trial by the limitation of his cross-examination of Cunningham and by the perjury of Turner. As to the perjury claim, respondent conceded that the prosecution was without knowledge of the perjury when it was used. Judge Weinfeld held that respondent had to make a showing in this respect of prosecutorial misconduct, whether by design or negligence. This respondent failed to do (22a-25a). As to the Cunningham argument, the respondent claimed that this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), dictated a finding of denial of due process. Judge Weinfeld, a most distinguished District Judge, held that the rejected evidence considered in *Chambers* bore persuasive assurances of trustworthiness. In the instant matter, he found that the indicia that Cunningham's confession was unreliable far more compelling. The state trial court's refusal to allow examination of Cunningham's alleged complicity in the murders did not impair respondent's defense to the extent of denying him a fair trial (19a-22a).

On February 2, 1977, the Court of Appeals reversed and remanded the matter to the District Court with instructions to grant the writ of habeas corpus unless respondent is re-

tried within a reasonable time to be set by the District Court (1a-13a). The decision for the Court of Appeals by Judge Oakes did not find it necessary to reach the perjury issue but reversed on the limitation of examination of Cunningham as violative of respondent's due process right to a fair trial. Judge Oakes lost sight of the fact that he was not a supervisor. His decision singularly casts doubt upon the credibility of Ms. Laccorn and Ms. Marcell, a most surprising statement not only because of the factual strength of their testimony, but also because it was not the Court's function. That Court apparently found it relevent that Ms. Laccorn's identification at the lineup was not until some five weeks after the incident (6a). It also found relevant the fact that Ms. Marcell when asked at trial to identify respondent, at first pointed to a codefendant then stated she had made a mistake. Ms. Marcell also had been unable to identify a photograph of the respondent prior to the lineup. The Court also noted the contradiction between these two witnesses as to the description of the coat respondent was wearing on the day of the crime (6a).

Centering on the Cunningham issue, Judge Oakes recognized that the question for the Court to decide was whether the limitation of the desired cross-examination was erroneous only in the sense that it deprived respondent of a fundamentally fair trial (8a). Judge Oakes held that since *Chambers* was limited to the "facts and circumstances" of that case, it was not directly controlling here. Also, it was not decided in *Chambers* whether a significant restriction on a defendant's examination of a witness who has confessed to the crime is alone enough to deny the defendant a fair trial (9a). Judge Oakes stated that this Court indicated such a restriction was error (9a).

The Court of Appeals expressed considerable doubt as to the relative unreliability of Cunningham's confession and held that restricting examination of such a witness with respect to his prior confession was enough by itself to deny the defendant a fair trial where the confession, though re-

tracted, has some semblance of reliability, a test more than met by Cunningham's statement. This is the height of absurdity.*

Reasons for Granting the Petition for Certiorari

A. The Second Circuit's interpretation of *Chambers* conflicts with that of the Fifth Circuit.

Chambers v. *Mississippi, supra,* held that a state trial court's rigid application of its voucher and hearsay evidentiary rules had resulted in denial of due process. This holding was limited to the "facts and circumstances of this case" (410 U.S. at 303), and we find nothing by this Court which permits expansion of *Chambers* to the murder conviction in this case. Chambers was convicted of killing a policeman in a barroom brawl. After Chambers' arrest, one MacDonald gave a written, sworn confession to the police. Chambers called MacDonald as his witness and introduced the confession into evidence. One cross-examination by the state MacDonald repudiated the confession. The trial court held that MacDonald could not be examined on the repudiation by Chambers' attorney because of the state's voucher rule. Chambers also offered three witnesses who would have testified that MacDonald, had made oral confessions to them. These witnesses were not permitted to testify since their testimony would be hearsay and there was no exception in that state for admissions against penal interest.

It should be noted that in *Chambers,* there was little hard evidence that the defendant had shot the policeman. The hearsay statements excluded at trial "provided con-

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* It should be noted that even if respondent's counsel had been permitted to treat Cunningham as an adverse witness and examine him on prior inconsistant statements, the only effect this examination would have would be on the credibility of Cunningham not on the issue of respondent's guilt or innocence.

siderable assurance of their reliability." *Chambers, supra* at 300. The cumulative effect of the trial court's rulings made Chambers defense "far less persuasive". The excluded evidence strongly pointed the finger of guilt at MacDonald while the evidence against Chambers was minimal. There was independent corroboration of MacDonald's admission. The *Chambers* Court emphasized (*supra* at 302) that the holding was in no way diminishing the traditional respect accorded to the States in establishing and implementing their own criminal trial rules and procedures, an attitude wholly missing in the opinion of Judge Oakes.

In *Maness* v. *Wainwright,* 512 F.2d 88 (1975), the Court of Appeals for the Fifth Circuit considered the question of whether or not a state defendant was denied due process solely by the state trial court's application of the voucher rule in preventing cross-examination of a witness called by him and excluding evidence impeaching that witness.

Maness was convicted of manslaughter in the death of his infant daughter. At trial, he called his wife as his witness and sought to treat her like an adverse witness and to impeach her. The trial court held that she was not an adverse witness and that petitioner could not impeach her. Maness sought to introduce exculpatory letters written by his wife in which she allegedly stated that she knew petitioner did not kill their daughter. Maness also sought to call as witnesses two relatives to whom his wife made statements that would exculpate Maness and cast doubt on his wife's credibility. Petitioner had testified at trial that he confessed to the crime only to keep his wife from going to jail and that he did not know how his daughter received her injuries. He repudiated his confession. The trial court would not admit the letters nor permit petitioner's two witnesses to testify.

The Fifth Circuit found that the state's application of its voucher rule worked to Maness' detriment in that some evi-

dence which suggested his innocence was excluded. The issue then became a question of degree. Whether Maness' defense was "less persuasive" to such a degree that his right to a fair trial had been violated? The Court decided that excluded hearsay evidence did not have the same degree of trustworthiness and reliability as the excluded evidence in Chambers. Maness argued that the letters and the proffered testimony cross-corroborated each other. The Court rejected this argument and found that the net effect of the excluded testimony, petitioner's testimony, his wife's testimony and the excluded letters was that neither petitioner nor his wife knew what caused their daughter's death. Since there was not positive indicia of reliability, the Fifth Circuit found that the state court's application of the voucher rule did not deprive Maness of a trial in accordance with motions of fundamental fairness (*supra* at 92).

Although a writ of certiorari to the Fifth Circuit was originally granted in *Maness,* this Court subsequently decided the writ had been improvidently granted (45 U.S.L.W. 4331, March 29, 1977).

It is respectfully submitted to this Court that the decision of Judge Oakes in the instant matter, holding that respondent was denied a fair trial solely on the basis of the restriction of redirect-examination* concerning his witness's prior confession, went far beyond what this Court held or implied in *Chambers.* The Second Circuit's test that the confession must have "some semblance of reliability" was incorrect (13a).

Respondent's defense was not impeded to the same degree as in *Maness.* Indeed it was not impeded at all. Respondent's defense was alibi. Since neither the alibi defense nor whatever Cunningham might have said on

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* Although the opinion of the Circuit Court refers to cross-examination of Cunningham by respondent's counsel, the record shows that the examination referred to was redirect-examination.

cross-examination would have shed any light on who killed the Katz brothers, it cannot be said that the limitation of the redirect-examination interfered with respondent's right to a fair trial. The degree to which respondent's defense was "less persuasive" does not rise to a due process violation. The Second Circuit should have applied the standard of trustworthiness and corroboration stated in *Chambers* to the excluded examination. There was no corroboration of Cunningham's statements and the record shows there is doubtful reliability to the confession.

B. The Court of Appeals misinterpreted a state court's evidentiary ruling to be a matter of constitutional dimension.

The trial court's limitation of redirect-examination of a witness is a "state court's evidentiary ruling and not grounds for federal habeas relief." *United States ex rel. Hardy* v. *McMann,* 292 F. Supp. 191, 192 (S.D.N.Y. 1968). As in *United States ex rel. Sadowy* v. *Fay,* 284 F. 2d 426, 427 (2d Cir. 1960), "the trial court was merely applying a rule of evidence in accordance with its interpretation of New York law. This raises no federal question." See also *Buchalter* v. *New York,* 319 U.S. 427 (1943); *United States ex rel. Holliday* v. *Adams,* 443 F. 2d 7 (2d Cir. 1971); *Schaefer* v. *Leone,* 443 F. 2d 182 (2d Cir.), *cert. den.* 404 U.S. 939 (1971); *United States ex rel. Santiago* v. *Follette,* 298 F. Supp. 973 (S.D.N.Y. 1969); and *United States ex rel. Birch* v. *Fay,* 190 F. Supp. 105 (S.D.N.Y. 1961).

The trial court correctly excluded redirect-examination regarding Cunningham's written statement since it did not comply with the statute's requirement that the statement be signed or sworn to. Exclusion of examination of other statements Cunningham had made was proper since Cunningham's testimony did not inculpate the respondent. The confession of MacDonald in *Chambers* was signed and sworn to. There was inherent reliability in Mac-

Donald's confession as well as corroboration. There was neither in Cunningham's statement.

It is submitted that the Second Circuit improperly questioned the prosecution's case by its inquiry into the credibility of Ms. Laccorn and Ms. Marcell as to their identification of respondent to shore up its disagreement with Judge Weinfeld and the state court judges. The jury had been faced with the discrepancies in testimony and as trier of fact resolved these discrepancies. It is a firm principle lost sight of sometimes that federal habeas courts review only for violation of federal constitutional standards and may not retry cases *de novo*. *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972); *Schaefer* v. *Leone, supra* at 182. The instant matter is not one where there was a "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). This Court is under a duty, it appears to us, to insist that Federal habeas corpus not be used to tamper with state court convictions simply because of disagreements about evidentiary rulings especially where the proof of the participation in the crime is so definite as here.

The Court of Appeals here assumed the role of trial court and jury to test the credibility of witnesses whose demeanor could not be judged by them and whose testimony had already been found believable by the jury, in order to bolster its conclusion that respondent was denied a fair trial. This the Court cannot do.

The record in this matter has been reviewed numerous times by the state appellate courts and by Judge Weinfeld in the District Court. The conviction should not be reversed because a federal Court of Appeals has now read the record in a different light.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and summarily reversed or plenary argument directed.

Dated: New York, New York, May 3, 1977.

Respectfully submitted,

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APPENDIX A

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 519—September Term, 1976.

(Argued December 7, 1976 Decided February 2, 1977.)

Docket No. 76-2126

ERNEST WELCOME,

Petitioner-Appellant,

v.

LEON J. VINCENT,
Superintendent, Greenhaven Correctional Facility,

Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
FRIENDLY and OAKES, *Circuit Judges.*

Appeal from dismissal of petition for writ of habeas corpus in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* on ground that petitioner was not denied a fair trial either by state trial court's refusal to allow him to question a witness as to a past confession to the same crimes or by implicit inducement to recanting prosecution witness to perjure himself in hope of receiving a lenient sentence.

Reversed on basis of trial court's restriction on scope of defense questioning of witness. Remanded with instructions to issue the writ of habeas corpus unless the People

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grant appellant a new trial within a reasonable period to be fixed by the district court.

JULIA P. HEIT, New York, N.Y., *for Petitioner-Appellant.*

JOSEPH W. HENNEBERRY, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel), *for Respondent-Appellee.*

OAKES, *Circuit Judge:*

This appeal presents the question whether appellant was deprived of his due process right to a fair trial when the trial court refused to permit his counsel to question a defense witness regarding his confession to the same crimes for which appellant and his two codefendants were on trial. We answer the question in the affirmative and reverse the judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* dismissing appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Facts

On March 10, 1970, appellant was convicted in the New York Supreme Court, Bronx County, on two counts of murder, for which he was sentenced to concurrent terms of 25 years to life imprisonment. The convictions were affirmed without opinion by the Appellate Division. 39 App. Div. 2d 841, 331 N.Y.S.2d 995 (1972) (mem.). Leave to appeal to the New York Court of Appeals was originally denied by that court's Judge Burke but was later granted by Chief Judge Breitel.

Appendix A.

While his application was pending in the Court of Appeals, appellant moved in the Supreme Court, Bronx County, for a new trial and vacatur of his conviction, pursuant to N.Y. Crim. Proc. Law §§ 440.10(1)(g), (h) (McKinney 1971), on the ground that a prosecution witness had recanted his trial testimony and admitted perjuring himself. The motion was denied by the Supreme Court without an evidentiary hearing, and this denial was affirmed without opinion by the Appellate Division, with one justice dissenting, 46 App. Div. 2d 860, 361 N.Y.S.2d 378 (1974) (mem.). The Court of Appeals, consolidating the direct appeal and the appeal from the denial of the new trial motion, dismissed the direct appeal, on the ground that Chief Judge Breitel had no authority to grant leave to appeal after it had been denied by Judge Burke, and affirmed the Appellate Division's denial of a new trial. 37 N.Y.2d 811, 338 N.E.2d 828, 375 N.Y.S.2d 573 (1975) (per curiam). Appellant then commenced the federal habeas corpus proceedings that have led to this appeal.

The murders for which appellant and two codefendants were indicted occurred on November 2, 1967, at the office of Katz Brothers Realty in the Bronx. Three armed men entered the office and shortly thereafter shot and killed the two Katz brothers. Prior to appellant's indictment for these crimes, the State indicted one Cunningham, who had confessed participation in the murders. Cunningham later repudiated this confession, claiming it was elicited through police brutality, but New York Supreme Court Justice Murtagh held, after an evidentiary "Huntley" hearing, *see People* v. *Huntley,* 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965), that Cunningham's statements to the police "were made freely and voluntarily and were in no wise the product of coercion of any nature whatsoever." Accordingly, Cunningham was tried for the Katz murders, and his statements to the police were admitted against him.

Appendix A.

In those statements Cunningham said that on the afternoon of November 2 he and three others, one Green, one Branch and a third fellow that he did not know, went to 308 East 149th Street in the Bronx, the address of the Katz realty office, and that he went up to the first floor landing, remaining in the hallway while the other three went into the office. After several minutes he heard some shots, became excited, ran down the stairs and out onto East 149th Street, then ran to Cortlandt Avenue, and then over to 145th Street and Third Avenue, at which point he hailed a cab and returned to Manhattan.

At Cunningham's trial, Detective Edward Farrell explained the circumstances surrounding this confession and told of other inculpatory statements and actions by Cunningham while in police custody. Farrell testified that, with the assistance of two other detectives, he went to Cunningham's apartment in Manhattan on November 9, 1967, took Cunningham back to the 40th Detective Squad clerical room in the Bronx, explained to him his *Miranda* rights, and heard Cunningham make certain admissions. Farrell testified that the detectives then took Cunningham in an automobile to 145th Street, which Cunningham said was familiar to him, and past the 149th Street bridge, which Cunningham said he and the others had driven across on the day of the shooting, and that Cunningham pointed out where they had parked the car at Morris Avenue, told the detectives, "Hold it," when they got about 75 feet past the Katz Brothers office, and said, "Back up, I believe you passed it, this looks like the place." He said, according to Farrell, "I think I was standing up in the middle of the stairs someplace. I ran in that direction," indicating Cortlandt Avenue. He also said, "This looks like the spot. I almost got hit over there by a car. I was running." Cunningham was subsequently questioned by an assistant district attorney, and then, according to Farrell, he and

Appendix A.

another detective took Cunningham for a second ride, during which he essentially confirmed his previous story as to what he had done and where he had been. Farrell further testified that Cunningham had said that Branch and Green had small revolvers and that the third fellow had a shotgun in a paper bag and was wearing a hat similar to the hat that was found in the Katz Brothers office as well as glasses, a pair of which had also been found in the office. One of the other detectives corroborated Detective Farrell's testimony.

Despite this incriminating evidence, the charges against Cunningham were dropped in the middle of his trial. Subsequently, at appellant Welcome's trial, the Bronx District Attorney appeared personally and stated that Cunningham was an addict suffering from the symptoms of withdrawal and "would have admitted anything," that he had been given a lie detector test which showed he had nothing to do with the particular case, and that a police investigation revealed that Branch and Green, the two persons whom Cunningham named as committing the robbery with him, could not have done so since one was out of state and the other was in jail at the time. It was left unexplained how such an unreliable person could have provided so many details (date and time of the robbery, exact location of the Katz office, number of men entering the office) regarding a robbery with which he supposedly had no connection, in the absence of police prompting, which was not suggested by the Bronx District Attorney or by any party to these proceedings. It was also left unexplained why the District Attorney's office originally had enough faith in Cunningham's confession to indict him, to argue for admission of the confession at the Huntley hearing, and to bring Cunningham twice to trial (the first trial ended in a mistrial).

Appellant Welcome was then brought to trial with two codefendants, Gale and Holmes. Janet Lacorn, a Katz

Brothers employee, identified appellant at trial; her identification had first occurred in a lineup some five weeks after the murders. Her testimony was cast in doubt by the fact that she said she had never seen appellant with a gun in his hand, although she had testified at the Cunningham trial that the second man to come into the office (identified as appellant) had a gun. Dolores Marcell, not an eyewitness to the crime, testified that at the time of the murders she had bumped into appellant on the street in front of the building that housed both the office where she worked and the Katz office. She, too, had identified appellant in a lineup, but, when asked in court to point to the man she had bumped into on the street, she first pointed to a codefendant, not Welcome, then claimed that she had been mistaken. Moreover, when shown photographs of appellant prior to the lineup, Mrs. Marcell had not been able to identify him. The testimony of these two key witnesses was contradictory on a crucial point: Mrs. Lacorn was quite positive that on the date of the murder appellant had been wearing a checkered coat and no hat; Mrs. Marcell was equally positive that appellant had been wearing a dark, solid color coat and a hat.

Other than police officers testifying about their investigation,[1] the only prosecution witness besides the two women was Vincent Turner, an acquaintance of appellant's. Some two weeks after the murders, according to Turner's testimony, appellant mentioned to him in a poolroom that he had "burnt" two men in the Bronx, "them two studs." At the time he testified, Turner, who had four previous convictions, was incarcerated awaiting sentencing on five felony

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[1] The police work in this case was singularly inept: no photographs were taken of the lineups; lineup forms were lost, so that no one knew the date of the Lacorn lineup; Detective Farrell's notebook on the investigation was "misplaced"; and appellant was permitted to leave the police station after Mrs. Lacorn had identified him.

indictments to which he had pleaded guilty a year earlier. Some two and one-half years after appellant's conviction, Turner recanted his trial testimony in a statement to appellant's counsel, a recantation upon which, as noted above, appellant based his unsuccessful new trial motion in the state courts.

Appellant presented an alibi defense at trial. His girlfriend stated that she was with him on the afternoon of the crime at his mother's house. Two friends of his mother testified that they saw him at his mother's house on the afternoon in question; one corroborated the girlfriend's testimony that appellant was washing the walls of the house in preparation for a party planned by his mother.

After appellant presented his alibi witnesses, he called the man previously tried for the crime, Cunningham, who testified, rather remarkably, that on November 2, 1967, he had driven to the Bronx with Branch and Green, that the three of them, with shotguns and pistols, entered the hallway at 308 East 149th Street in the Bronx and robbed the Katz office. The court refused to permit counsel to inquire on direct examination into any statements made by Cunningham to the detectives or the district attorney. On cross-examination by the State, Cunningham denied robbing the Katz office, stating that he did not at first understand the questions put to him by appellant's attorney, thinking that the attorney was talking about his "confession," a term used for the first time in appellant's trial by Cunningham himself. On redirect, counsel sought to question Cunningham regarding the confession, stating that he wished to use the prior inconsistent statements to impeach the witness's credibility. The court, however, refused to permit such questioning, on the ground that Cunningham, having been called by the defense and not having inculpated any of the defendants, could not be considered a hostile witness. At this point, the Bronx District Attorney

appeared at appellant's trial and, as noted above, explained why the charges against Cunningham had been dropped. He conceded that appellant had continually asserted his innocence and had requested a polygraph test, but said that the request had been denied because witnesses had identified appellant and because the test was "unreliable," although apparently not unreliable enough to prevent administration of it to Cunningham prior to the charges against him being dropped.

Discussion

Appellant presents two independent grounds upon which, he argues, his habeas corpus petition should have been granted. We need not consider the second of these, relating to Turner's recantation, because we find that the first, relating to the refusal of the trial court to permit cross-examination of Cunningham as to his confession, requires reversal. Our question, of course, is not whether the refusal to permit the desired cross-examination was erroneous as an evidentiary matter, but whether it deprived appellant of a fundamentally fair trial in violation of the due process clause of the Fourteenth Amendment. *See Buchalter* v. *New York,* 319 U.S. 427, 431 (1943); *United States ex rel. Sadowy* v. *Fay,* 284 F.2d 426, 427 (2d Cir. 1960) (Swan, *J.*), *cert. denied,* 365 U.S. 850 (1961); *United States ex rel. Corby* v. *Conboy,* 337 F. Supp. 517, 519 (S.D.N.Y. 1971).

In resolving the fair trial issue, our starting point must be the Supreme Court's decision in *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). The defendant in that case, like appellant here, sought to examine at trial another person who had confessed to the crime. In *Chambers,* that other person, one McDonald, had made a sworn, out-of-court confession, which the defendant Chambers introduced into evidence after calling McDonald to the witness stand. Then McDonald, on examination by the State, said that he had previously repudiated his confession. Following this examination, Chambers sought to cross-examine McDonald as an adverse witness, but the trial court refused to permit the desired questioning, on the ground that, since McDonald had not inculpated Chambers, he was not technically adverse. Chambers then sought to introduce the testimony of three persons to whom McDonald had admitted the crime. This testimony was excluded as violative of the hearsay rule. *Id.* at 291-92. The Supreme Court concluded that the combination of the hearsay exclusion and the restriction on Chambers' examination of McDonald denied Chambers "a trial in accord with traditional and fundamental standards of due process." *Id.* at 302. Its holding was limited to "the facts and circumstances of this case." *Id.* at 303.

Because of this latter limitation, *Chambers* is not directly controlling here. Its value in the instant case is further diluted by the fact that, by virtue of the hearsay testimony excluded there, the Supreme Court did not have to decide, *see id.* at 298, as we must, whether a significant restriction on a defendant's examination of a witness who has confessed to the crime is alone enough to deny the defendant a fair trial. The Supreme Court did indicate, however, that such a restriction constituted "error," *id.,* and it further stated that the criminal defendant's right of cross-examination is of vital importance:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton* v. *Evans,* 400 U.S. 74, 89 (1970); *Bruton* v. *United States,* 391 U.S. 123, 135-137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of

fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965).

Id. at 295.

The restriction on appellant's questioning in the instant case left the jury with Cunningham's initial admission on direct that he participated in the crime, followed (on questioning by the State) by his denial of involvement and his mention of a "confession" about which the jury was given no further information. Appellant's efforts to bring the confession itself before the jury, either through its introduction or through questioning of Cunningham, were halted by the trial court. Thus the jury did not receive information bearing directly on a key decision that it faced—whether to believe Cunningham's initial admission of guilt, which, if true, would have exonerated appellant. The prejudice to appellant's defense is manifest. The situation here closely resembles that in *Chambers*, where "all that remained from McDonald's own testimony was a single written confession countered by an arguably acceptable renunciation. Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination . . ." *Id.* at 294.[2]

The reason given by the state trial court in appellant's case for restricting questioning of Cunningham was the same as that given by the state courts in *Chambers*: since the witness called by the defendant had not incriminated

[2] It is true that Cunningham in his direct testimony had admitted his participation in the crime, though he claimed it was a misunderstanding, while in *Chambers* McDonald's confession was before the jury. But in *Chambers* the opportunity to cross-examine McDonald was limited as was the opportunity to examine (with the use of the confession) Cunningham here. In each case the defense was prevented from a searching probe on the witness stand of another who had confessed to the very crime for which the defendant was on trial.

the defendant, he could not be considered an adverse witness subject to impeachment by the party who called him. *Chambers* unequivocally rejected this line of reasoning as applied in a criminal trial: "The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality . . . ." *Id.* at 297-98. *Chambers* makes clear that appellant did not give up his due process right to examine Cunningham thoroughly merely by calling Cunningham to the witness stand.[3]

The district judge denied the writ on a ground different from that relied upon by the state trial court for restricting the questioning of Cunningham. In his view, *Chambers* found a denial of due process because the confession and related hearsay statements there bore "persuasive indications" of reliability and "trustworthiness," whereas in the instant case there were substantial "indicia that [Cunningham's] confession was unreliable." No. 76 Civ. 1562 (S.D. N.Y. Sept. 2, 1976), slip op. at 11, 12. We have considerable doubt about the relative unreliability of Cunningham's confession.[4] More importantly, we think that *Chambers*

[3] Although the trial court here made its ruling long before *Chambers* was decided, there is no question that the trial court's decision was erroneous as a matter of federal constitutional law at the time it was made. *Chambers* "establish[ed] no new principles of constitutional law," but rather was decided "in accord with traditional and fundamental standards of due process." 410 U.S. at 302. *See also Gates* v. *Henderson*, No. 76-2065 (2d Cir. Jan. 12, 1977), slip op. 1345, 1349 n.2 (distinguishing, for retroactivity purposes, between "decisions that clarify or extend" and those that "overrule or sharply change" existing law).

[4] Other than the reasons given by the Bronx District Attorney for dropping Cunningham's prosecution (the two alleged cocon-

(footnote continued on following page)

does not require that the confession be so reliable as to support a conviction or even to warrant trial of the confessor. The assessment of trustworthiness in *Chambers* appeared only in the context of the Supreme Court's discussion of the hearsay testimony that the defendant there sought to introduce, in which three persons would have testified that they heard McDonald admit commission of the crimes. *See* 410 U.S. at 300-02. The *Chambers* Court did not consider the issue of trustworthiness at all in relation to the restricted questioning of McDonald.

Our holding is narrowly confined to rare situations of this sort, where another person, present on the witness stand, has previously confessed that he, rather than the defendant on trial, has perpetrated the crime. We hold that to restrict examination of such a witness, so that his

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(footnote continued from preceding page)

spirators could not have participated; a polygraph test indicated Cunningham's innocence; Cunningham was a narcotics addict undergoing withdrawal and hence unreliable), reasons that left many questions open, as discussed *supra*, Judge Weinfeld relied on the fact that Cunningham's statement to an assistant district attorney failed to identify the building where the crime occurred, the date of the crime, and the fourth person involved in the crime, and was not against his penal interest, since it did not state Cunningham was present at the shooting or committed a robbery. Slip op. at 12-13. But this statement of Cunningham's was only one of several made to investigating officials, and appellant and his codefendants sought to question Cunningham about all of them. According to the police detectives, Cunningham twice directed them to the scene of the crime, he indicated to them that he knew the date or approximate date on which the crime occurred, and he knew the number of armed men who had entered the Katz office. He identified a hat and a pair of glasses, found at the scene of the crime, as belonging to the unknown fourth robber. Finally, Cunningham's statements were plainly against his penal interest—he admitted helping to plan and to execute an armed robbery that resulted in two deaths. His statements survived a Huntley hearing and established a case prima facie of felony murder against him, as is evidenced by the fact that the State twice brought him to trial for murder.

prior confession may not be proven, is to deny the defendant a fair trial, at least when the confession, though retracted, has some semblance of reliability, a test more than met by Cunningham's statements here, *see* note 4 *supra*. We disavow any attempt to "constitutionalize" the law of evidence pertaining to the use of prior statements of a witness, except to the extent of answering the narrow question left open in part by the nature of the holding in *Chambers*.

Because the restriction on appellant's questioning of Cunningham denied him a fundamentally fair trial, we reverse the judgment of the district court and remand to that court with instructions to issue the writ of habeas corpus unless the People grant Welcome a new trial within a reasonable period to be fixed by the district court.

Reversed and remanded.

APPENDIX B

Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civil 1562

ERNEST WELCOME,

Petitioner,

—against—

LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Respondent.

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U.S. DISTRICT COURT
FILED
SEP 02 1976
S.D.OF N.Y.

Appendix B.

EDWARD WEINFELD, D.J.

Petitioner, now serving a sentence of twenty-five years to life imprisonment in Green Haven Correctional Facility in Stormville, New York, seeks his release on a federal writ of habeas corpus. He claims he was denied his right to a fair trial under the Fourteenth Amendment by the refusal of the trial judge to allow him to examine a defense witness as to a confession previously made by that witness, and by the alleged perjury of another witness.

Petitioner and two co-defendants were convicted of two counts of murder on March 10, 1970, after a jury trial in the Supreme Court of the State of New York. His conviction was affirmed without opinion by the Appellate Division, First Department on May 2, 1972,[1] and leave to appeal, although initially denied by Judge Burke of the Court of Appeals, was granted by Chief Judge Breitel on March 7, 1974.

In the interim petitioner moved, on May 21, 1973, for a new trial and vacatur of the judgment of conviction,[2] based upon the post-trial recantation of a prosecution witness. The motion was denied by the Supreme Court without an evidentiary hearing on November 7, 1973. The Appellate Division affirmed the denial of petitioner's motion on December 5, 1974, with one judge dissenting and granting permission to appeal to the Court of Appeals.[3] The direct appeal from the judgment of conviction and the appeal from the denial of petitioner's motion for a new trial were consolidated in the Court of Appeals, which dismissed the direct appeal and affirmed the denial of the motion for a

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[1] 39 App. Div. 2d 841, 331 N.Y.S.2d 995.

[2] *See* N.Y.C.P.L. §§ 440.10(1) (g) and (h).

[3] 46 App. Div. 2d 860, 361 N.Y.S.2d 378 (1st Dept.).

new trial on September 24, 1975.[4] It is not disputed that petitioner has exhausted his available state remedies.

The crime of which petitioner was convicted was the murder, on November 2, 1967, of Hyman and Seymour Katz, during a robbery at their real estate office in the Bronx by three men.[5] Petitioner and his co-defendants proceeded to trial under an indictment which charged them and a fourth unnamed person in two counts with common law murder and in two counts with felony murder. The case against petitioner was based on the testimony of three witnesses. Janet Laccorn, an employee of the Katz brothers, was present when the robbery and shooting occurred. She identified one of the robbers, whom she had observed for about thirty seconds, as petitioner. Dolores Marcell, who worked in a store on the street floor of the same building, testified that she came outside when she heard screaming from the Katz brothers' office. She identified petitioner as one of three men she encountered on the street as they were leaving the building from the entrance to the Katz brothers' office. Both witnesses identified petitioner in line-ups and, although Marcell initially pointed to one of petitioner's co-defendants instead of petitioner, in court as well.

Vincent Turner testified that about three weeks after the robbery he was approached in a pool room by peti-

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[4] 37 N.Y.2d 811, 375 N.Y.S.2d 573, 338 N.E.2d 828. The Court of Appeals dismissed petitioner's direct appeal on the ground that Chief Judge Breitel had no authority to grant leave to appeal after Judge Burke had denied it, and that therefore the case was not properly before the court.

[5] Since there is no dispute as to the essential facts of the case, no evidentiary hearing need be held. United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1331 n.3 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974); United States *ex rel.* Randazzo v. Follette, 282 F.Supp. 2, 8 (S.D.N.Y. 1968), *remanded on other grounds,* 444 F.2d 625 (2d Cir.), *cert. denied,* 404 U.S. 916 (1971); *see* Procunier v. Atchley, 400 U.S. 446, 451 (1971).

tioner, who asked Turner if he had heard what had happened in the Bronx, and referred to "[t]hem two studs that I burnt." On cross-examination it was brought out that Turner previously had been convicted four times, and that he was then in jail awaiting sentence for five robberies, each of which could lead to imprisonment for up to twenty-five years. Turner testified that although no promise had been made by the state, he did expect some consideration in his sentencing as a result of his testimony.

Petitioner's defense was an alibi, based on the testimony of his girl friend and two friends of his mother that petitioner was at his mother's house at the time the crime occurred, helping prepare for a party the next day. He also called Albert Cunningham as a defense witness. During the investigation of the murders, Cunningham had been questioned by an Assistant District Attorney in the presence of two detectives, and had stated that he participated in the robbery with two persons named Branch and Green and a fourth whom he could not identify. Cunningham told the investigators that while the others went upstairs in the building he remained on the staircase; that when he heard a shot he ran from the building and left the area in a cab; and that he later met Branch who gave him $200 which he guessed "was for that." Cunningham's oral answers, although reduced to writing, were neither signed nor sworn to by him. He was indicted for the murders and brought to trial alone. The confession was ruled admissible against him after a *Huntley* hearing.[6] However, a mistrial was declared and the charges were dropped when the prosecutor decided that the alleged confession was unreliable and that the wrong man was on trial.

Against that background, Cunningham was called as a defense witness. On direct examination by petitioner's

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[6] People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

counsel, Cunningham testified that he had been indicted and charged with the Katz murders and that before his arrest and indictment he had had conversations with the Assistant District Attorney and the detectives (T. 1194-95).[7] When petitioner's counsel sought to ask Cunningham what he had said at that time, the court sustained the prosecutor's objection. After sidebar discussion the trial judge indicated that he would permit defense counsel to interrogate Cunningham as to any part he or anybody else played in the murders, but not as to what Cunningham told others. The judge further ruled that if it appeared Cunningham was a hostile witness, that is, implicated Welcome or his co-defendants, cross-examination of Cunningham would be permitted as to his prior inconsistent statements to the Assistant District Attorney and others, even though such prior statements were not in writing (T. 1216-18).

Upon continued direct examination, Cunningham testified that he drove to the Bronx with Branch and Green and that they were armed with a shotgun and pistols. He testified that they robbed the Katz brothers' real estate office but that he did not know if during the course of the holdup a shooting occurred (T. 1223-24). On cross-examination by the prosecutor, Cunningham retracted his prior testimony, stating that he misunderstood defense counsel and thought his questions referred to the confession—a term, incidentally, volunteered by Cunningham.[8] He then categorically denied committing the robbery, knowing anything

[7] References are to pages of the trial transcript as printed in the record of petitioner's direct appeal to the Appellate Division.

[8] The prosecutor, during extensive sidebar discussion, emphasized that he had never referred to or mentioned the word "confession," and the court observed that had the prosecutor moved to strike Cunningham's volunteered reference to it, he would have granted the motion (T. 1235).

about the crimes or even knowing the location of the Katz brothers' realty office (T. 1225-28). On redirect, defense counsel, contending among other matters that Cunningham "said there was a confession" and therefore "opened the door" (T. 1229-30), sought to question him about his oral statements to the Assistant District Attorney and the detectives, to establish that these were inconsistent with the answers given on cross-examinaion. The court refused to allow the inquiry on the ground that Cunningham's testimony had not inculpated Welcome or his co-defendants and that his oral statements were inadmissible hearsay.

Petitioner's first claim is that the trial court's refusal to allow him to question Cunningham about the alleged confession deprived him of a fundamentally fair trial in violation of his right to due process of law. He gives three reasons why it was error to exclude Cunningham's statement: (1) because the prosecutor "opened the door" during cross-examination of Cunningham by asking a question which elicited a response referring to the confession; (2) because once Cunningham retracted the testimony he gave on direct examination, the defendant was entitled to impeach him despite the provisions of section 8-a of the former Code of Criminal Procedure, permitting the use of prior inconsistent statements to impeach a party's own witness only when such statements were made under oath or were in writing subscribed by the witness;[9] and (3) because the confession was a declaration against Cunningham's penal interest. Assuming that petitioner is correct in those contentions, it does not follow that a writ of habeas corpus must be granted. The question presented on

[9] "In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath." Section 8-a has been superseded by N.Y.C.P.L. § 60.35.

this application is not one of the law of evidence but one of constitutional dimensions, to be tested under the due process clause of the Fourteenth Amendment. Thus, at issue is not whether it was evidential error to foreclose petitioner from questioning Cunningham about his out-of-court statements, but whether that ruling deprived petitioner of his right to a fundamentally fair trial.[10]

Petitioner claims that *Chambers* v. *Mississippi*,[11] dictates a finding that he was denied due process. In *Chambers* the defendant, accused of murdering a police officer, attempted to prove that the crime had been committed by a man named MacDonald. MacDonald had given a sworn statement to Chambers' attorneys stating that he and not Chambers had killed the policeman, but retracted the confession before Chambers' trial. At his trial, Chambers was allowed to introduce testimony from eye-witnesses linking MacDonald to the shooting, and to have MacDonald's sworn confession read to the jury. However, when MacDonald, who was called as a defense witness, repudiated his confession upon cross-examination, the court did not allow Chambers' attorney to cross-examine MacDonald as a hostile witness. The court further refused, on the grounds of hearsay, to allow Chambers to present testimony from three witnesses of other out-of-court confessions by MacDonald. The Supreme Court reversed Chambers' conviction.

Chambers did not establish a per se rule that failure to permit cross-examination of a witness about prior state-

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[10] United States *ex rel.* Holliday v. Adams, 443 F.2d 7, 8 n.1 (2d Cir. 1971); United States *ex rel.* Sadowy v. Fay, 284 F.2d 426, 427 (2d Cir. 1960), *cert. denied*, 365 U.S. 850 (1961); United States *ex rel.* Corby v. Conroy, 337 F.Supp. 517, 519 (S.D.N.Y. 1971); United States *ex rel.* Birch v. Fay, 190 F.Supp. 105, 107 (S.D.N.Y. 1961); *see also* Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); Dutton v. Evans, 400 U.S. 74, 80-83 (1970).

[11] 410 U.S. 284 (1973).

ments which, by inculpating the witness, allegedly exculpate the defendant, invariably denies due process. The Court held only that upon the particular "facts and circumstances of this case," the combined effect of all of the trial court's rulings was to deny Chambers "a trial in accord with traditional and fundamental standards of due process," because those rulings made Chambers' defense "far less persuasive" than it would have been had his opportunity to present evidence not been restricted.[12] Crucial to the Court's finding that Chambers was denied due process were the persuasive indications that the hearsay statements offered were reliable. The confessions were volunteered spontaneously to friends within twenty-four hours of the crime; they were corroborated by eye-witness testimony, physical evidence and MacDonald's own sworn confession; they were clearly and devastatingly against MacDonald's penal interest; and MacDonald was present in court for cross-examination concerning the statements. In sum, the rejected evidence "bore persuasive assurances of trustworthiness."[13]

Petitioner claims that his inability to present Cunningham's confession to the jury similarly deprived him of a fair trial. He argues that the reliability of Cunningham's confession is shown in several ways. First, as in *Chambers*, Cunningham's statement was against his penal interest. Second, the state believed in the reliability of the confession enough to bring Cunningham to trial. Third, the confession was ruled admissible against Cunningham in the *Huntley* hearing.

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[12] 410 U.S. at 294, 302-03. *See* Maness v. Wainwright, 512 F.2d 88, 90-91 (5th Cir.), *reh. en banc granted*, 519 F.2d 1085 (5th Cir. 1975), *order for rehearing en banc vacated*, 528 F.2d 1381 (5th Cir. 1976); *cf.* United States v. Jenkins, 496 F.2d 57, 69-70 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

[13] 410 U.S. at 300-02.

However, the indicia that the confession was unreliable are far more compelling. Not only was Cunningham's unsworn confession uncorroborated by any other evidence, but a mistrial was declared and the prosecution against him was dropped for substantial and compelling reasons. As explained to the trial court by the District Attorney of Bronx County (T. 1244-46), police investigation revealed that Branch and Green, the two persons whom Cunningham named as committing the robbery with him, could not have done so since one was out of state and the other in jail at the time. Cunningham was given a polygraph test which indicated he had nothing to do with the robbery. In addition, when he made the statement, according to the District Attorney, Cunningham was a narcotics addict undergoing "the pangs of withdrawal" and "would have admitted anything" (T. 1245-46).

The statement itself was vague and confused. Cunningham did not identify the building where the robbery took place, except to say that it was a "business type building" in the Bronx. Nor could he state on what day the robbery occurred. Shown a hat and a pair of glasses apparently found by police at the scene of the murders, Cunningham stated that they belonged to the fourth person, whose name he did not know. Finally, instead of being clearly against Cunningham's penal interest, the alleged confession contains no statement that he was present at or saw the shooting or that he actually committed a robbery. Unlike the statement in *Chambers,* therefore, Cunningham's statement does not persuasively appear to be trustworthy. Under these circumstances the court's refusal to allow examination of Cunningham as to his alleged complicity in the homicides did not impair petitioner's defense to such an extent as to deny him a fundamentally fair trial.

Petitioner's second claim rests on the recantation of Vincent Turner. Over two years after the trial Turner

gave an oral statement to petitioner's attorney, which was recorded and transcribed, and signed an affidavit. In those statements Turner said that his testimony relating his conversation with petitioner about "them two studs" that petitioner "burnt" was perjured, given at the behest of one of petitioner's co-defendants who feared that petitioner would testify against him and hoped that strong evidence against petitioner would induce him not to do so.

While the fact that Turner has recanted does not establish that he actually committed perjury at the first trial, since such recantations are justly regarded with great suspicion,[14] the court will assume that Turner did commit perjury. However, that fact by itself does not require that the instant application be granted. Petitioner is entitled to a federal writ of habeas corpus voiding the state court judgment of conviction only upon a showing that the state contrived to deprive him of his right to a fair trial, protected under the due process clause. The deprivation of that right is not established by a mere showing that petitioner's conviction may have been the result in part of perjury by a prosecution witness, unknown to the prosecutor. It is the deliberate, knowing, or even negligent use of false testimony by the prosecution, or the suppression of evidence favorable to the defendant, which so offends the "rudimentary demands of justice" that it deprives an accused of his right to a fair trial and taints his conviction.[15] Accordingly, to establish his claim that

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[14] United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); *see also* Rhinehart v. Rhay, 440 F.2d 718, 721-23 (9th Cir.), *cert. denied,* 404 U.S. 825 (1971).

[15] Giglio v. United States, 405 U.S. 150, 153-54 (1972); Brady v. Maryland, 373 U.S. 83, 86-87 (1963); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holahan, 294 U.S. 103, 112-13 (1935).

Turner's alleged perjury deprived him of a fair trial, petitioner must show that prosecutorial misconduct, whether by design or negligence, was implicated.[16]

Petitioner concedes that the prosecution had no knowledge of Turner's alleged perjury. However, he claims Turner was "induced to perjure himself and testify favorably for the Prosecution because of the expectation of leniency from the People in his own pending robbery cases," and that "since it was the bargaining practices of the People that induced Turner to perjure himself, the Prosecution, albeit lacking direct knowledge of the perjury, must still be held accountable."

This claim is without merit. To accept it would be effectively to foreclose the use of the testimony of informers, confederates or accomplices who are awaiting sentence or facing possible criminal charges. From time immemorial such testimony has been recognized as necessary to secure

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[16] Burks v. Egeler, 512 F.2d 221, 223-26 (6th Cir.), *cert. denied*, 423 U.S. 937 (1975); Elliott v. Beto, 474 F.2d 856, 857 (5th Cir.), *cert. denied*, 411 U.S. 985 (1973); United States *ex rel.* Cantanzaro v. Mancusi, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970); Luna v. Beto, 395 F.2d 35, 41 (5th Cir. 1968), *cert. denied*, 394 U.S. 966 (1969) (Brown, J., concurring); Johnson v. Bennett, 386 F.2d 677, 679-80 (8th Cir. 1967), *vacated on other grounds*, 393 U.S. 253 (1968); *see also* United States *ex rel.* Birch v. Fay, 190 F.Supp. 105, 107 (S.D.N.Y. 1961). Under certain circumstances, which may vary from case to case, however, newly discovered evidence that a judgment of conviction is based in part upon material perjured testimony may warrant the granting of a motion for a new trial even when the prosecution was unaware of the perjury. *See* United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3756 (U.S. June 30, 1976) (No. 75-492); United States v. DeSapio, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999, 406 U.S. 933 (1971); United States v. Marquez, 363 F.Supp. 802, 805-06 (S.D.N.Y. 1973), *aff'd without opinion*, 490 F.2d 1383 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

the enforcement of criminal laws.[17] It is one thing to say that a defendant is entitled to all information relating to the credibility of a witness and every opportunity to challenge his reliability.[18] But it is quite another matter to suggest a virtual blackout of such evidence and to prevent its use by the prosecution. As long as the defense is afforded a full and fair opportunity to expose flaws in a witness' testimony, the motives he may have to testify falsely, and the other factors which touch upon his credibility, the requirement of due process of law is met. In this case, Turner's motives for fabrication were exposed to the jury and argued at length by counsel.[19] Petitioner has failed to show that knowing use of perjured testimony which constitutes a denial of due process.

The petition for a writ of habeas corpus is dismissed upon the merits.

Dated: New York, N.Y.
September 2, 1976

EDWARD WEINFELD
United States District Judge

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[17] *See* Hoffa v. United States, 385 U.S. 293, 311 (1966); United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); Handschu v. Special Services Division, 349 F.Supp. 766, 769 (S.D.N.Y. 1972).

[18] *See* Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

[19] In addition, it should be noted that Turner's recantation statement belies the factual basis for petitioner's argument. Turner stated that he perjured himself, not in the hope of getting a lighter sentence, but at the request of petitioner's co-defendant.